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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 935

BALLENGER PAVING COMPANY, INC., PETITIONER

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 18–25; 25–39) are reported at 299 F. 2d 297. The opinion of the district court (Pet. App. 12–17) is reported unofficially at 43 Lab. Cases ¶ 31,203.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1962 (Pet. App. 40). The petition for a writ of certiorari was filed on May 4, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether on the facts of this case the court of appeals properly held that the district court should have granted an injunction against future violations of the Fair Labor Standards Act, where the violations were conceded at trial and where they continued long after the application of the Act to his operations had been settled beyond reasonable doubt by a controlling court decision.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060), as amended (29 U.S.C. 201 *et seq.*). The pertinent provision, as of the time the complaint was filed, is set forth in the petition at pp. 2–3.

STATEMENT

This action was brought by the Secretary of Labor to enjoin petitioner from further violations of the overtime-compensation and record-keeping provisions of the Fair Labor Standards Act. Petitioner is a paving contractor, and the violations occurred principally in the performance of its contracts for the paving of facilities at military air bases (Pet. App. 18). Between 1955 and October 1957, when the instant suit was brought, the Department of Labor sought to bring petitioner into compliance with respect to these contracts (*id.* 18–19). Petitioner refused to comply on the ground that "there is no law requiring overtime compensation for hours worked in excess of forty in a work week to employees employed on air fields or similar military construction" (*id.* 18–19). On June 30, 1958, while the action was pending in the District Court for the Northern District of

Georgia, the court of appeals for that circuit decided *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781 (C.A. 5). In that case the court "expressly held that a contractor in the position of [petitioner] here was covered by the Fair Labor Standards Act" (Pet. App. 19). Petitioner's counsel had actual notice of this decision, at the latest, by January 23, 1959, when attorneys for the Secretary of Labor called it to their attention at a conference in this case. Nonetheless, petitioner continued its violations until April 23, 1959, and in August 1959 at a pre-trial hearing, stood by its position that it was not required to comply with the Act, contending that *Empire Gas* had been wrongly decided (Pet. App. 19–21). By this time, the total amount of wages withheld in violation of the Act admittedly amounted to $39,000, of which $36,600 was due for work on the airport projects and $2,400 for work on road projects never claimed to be outside the scope of the Act (*id.* 18). This amount has not been paid over to the employees (*id.* 25).

At trial, petitioner abandoned the contention that its military construction was beyond the coverage of the Act. It admitted its past violations, insisted that they were innocent and argued that no injunction should issue (Pet. App. 12, 21). The district court was of the opinion that "the law had been in some confusion for a period of time" and that the confusion had not been "put at rest" until the *Empire Gas* decision (Pet. App. 12, 13). Accordingly, it concluded that petitioner had acted in good faith in disregarding the Act. It found further that since April 1959 petitioner had been in full compli-

ance with the Act and, since it saw no reason to anticipate future violations, it denied injunctive relief (*id.* 16).

The court of appeals (Circuit Judge Cameron dissenting) reversed, ruling that it had been "perfectly clear" since 1950, when *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, was decided, that the mere fact that the employment was in connection with the national defense did not make the Fair Labor Standards Act inapplicable (Pet. App. 24). The court noted also that petitioner had continued in violation "for a period of more than nine months" after the "precise point" had been decided adversely to its position in the same circuit in *Empire Gas, supra* (*id.* 23–24). The court concluded that in "the circumstances of this case"—"where an employer has actually profited from his failure to comply with the law, and where his persistence in such failure, still to his profit, extends beyond the time when by all reason his doubts or uncertainties as to coverage should have vanished"—the petitioner had no valid defense to the petition for injunction (*id.* 23–24). It accordingly directed the trial court to enter an injunction (*id.* 25).

ARGUMENT

The petition asserts that an important question is presented by the alleged departure of the court of appeals from two accepted principles of equitable relief: (1) that "injunctions do not issue as a matter of absolute right upon proof of violation of a statute"; and (2) that "the controlling factor is the probability or improbability of future violations" (Pet. 4).

The decision below in fact confirms both principles. It does not depart from any settled principle of law or conflict with the decisions of this Court or of the other courts of appeals; it presents no question warranting further review.

1. In ordering that an injunction be entered in this case, the court of appeals expressly declared that "an injunction does not follow as a matter of course upon either a finding or stipulation of violation of the act" (Pet. App. 23). It explicitly based its order on "the circumstances of this case"—principally on the circumstance that petitioner had persisted "to his profit" in violation "beyond the time when by all reason his doubts or uncertainties as to coverage should have vanished" (*id.* 23). The court noted particularly (*id.* 23–24):

> * * * we are nevertheless compelled to find that, under the circumstances of this case, the failure of [petitioner] to pay the legally required wages for a period of more than nine months after this Court's decision in *Empire Gas*, at a time when it was conscious of constant demands by the Department of Labor that it come into compliance, and at a time when this precise point was being litigated, and which time involved three months after actual notice to its counsel and six weeks after actual notice and advice to its President, deprives it of any defense against the Government's claim that an injunction be issued.

Thus, it was petitioner's past refusal to comply with the law in the absence of specific judicial restraints which was decisive in moving the court of appeals to

direct entry of an injunction. In so ruling, the court was following, not disregarding, the rule that the probability of future violations is the basic consideration in determining whether an injunction should issue.

Petitioner properly links the instant decision with two other recent decisions of the same court, *Mitchell* v. *Pidcock*, 299 F. 2d 281, and *Opelika Royal Crown Bottling Co.* v. *Goldberg*, 299 F. 2d 37; but gains no support from either of them in its assertion that "the court of appeals appears to have adopted a more automatic rule [i.e., excluding consideration of the likelihood of future violations] for the granting of injunctions in cases arising under the Fair Labor Standards Act" (Pet. 7). These cases likewise dealt with employers who persisted in their violations after there was no longer any reasonable basis for denying coverage. *Pidcock*, 299 F. 2d at 285–287; *Opelika*, 299 F. 2d at 44. In *Pidcock*, the court held that where "the reason for the employer's not seeing [his statutory duty] is that his head is buried in the sand," his "assurances * * * of future compliance" are not sufficient to justify the denial of an injunction. 299 F. 2d at 286–287. The court made it clear, however, that it did "not say or imply that injunctions should be issued freely, without regard for the facts, simply because it is the Government asking for the injunction." *Id.* at 287. Similarly in *Opelika*, the court of appeals ordered an injunction because of the employer's "attitude with respect to compliance" as demonstrated by his past "unwillingness to comply with settled interpretations of the Act." 299 F. 2d

at 44. In doing so, it reaffirmed "the rule * * * [setting out the principal considerations] for reviewing the discretionary denial of an injunction * * * set down in *Mitchell* v. *Hodges Contracting Co.*, 5 Cir., 1956, 238 F. 2d 380, 381" (*id.* at 43), i.e., the very rule on which petitioner relies in this Court (Pet. 5).

There is no basis for petitioner's fears that the court of appeals has adopted an "automatic" rule for the issuance of injunctions. Two months after the instant decision, that court in *Goldberg* v. *Southern Farms*, No. 19193, decided March 30, 1962 (C.A. 5) (not yet reported except at 15 WH Cases 423, 44 Lab. Cases ¶ 31,256), citing both this case and *Pidcock*, refused to order the entry of an injunction, although it rejected the holding below that there were no violations. Instead, it remanded with instructions that "the district court, in its discretion, may decline to issue an injunction." 15 WH Cases at 425.

2. The decision below is not inconsistent with either *Mitchell* v. *Lublin, McGaughy & Assoc.*, 358 U.S. 207, 208, 214-215, or *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 421, as petitioner asserts (Pet. 8). In *Lublin*, the district court dismissed the complaint on the ground that the employer's activities were local and not within the Act's coverage. Neither the district court nor the court of appeals ever reached the issue of injunctive relief. In *Youngerman-Reynolds*, this Court held that in the circumstances of that case it could not say that the district court abused its discretion in refusing to issue an injunction. 325 U.S. at 421. Neither decision holds or implies that an appellate court may not re-

verse a denial of injunction when it finds as the court did from the circumstances presented here, that the trial court has exceeded the bounds of sound judicial discretion.

Where the denial of an injunction or of a particular form of equitable relief has been deemed to be in excess of such discretion, this Court and the courts of appeals have not hesitated to order the entry of the injunction or to add forms of equitable relief to an injunction entered by the trial court. See, *e.g.*, *United States* v. *DuPont Co.*, 366 U.S. 316, 322–324; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47–48; *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 185–186; *Tobin* v. *Anthony-Williams Mfg. Co.*, 196 F. 2d 547, 551 (C.A. 8); *Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308, 311 (C.A. 10); *Walling* v. *Panther Creek Mines*, 148 F. 2d 604 (C.A. 7); *Morton Trust Co.* v. *Standard Steel Car Co.*, 177 Fed. 931 (C.A. 3); and *Johnson* v. *Foos Mfg. Co.*, 141 Fed. 73, 79, 88 (C.A. 6).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

CHARLES DONAHUE,
Solicitor,
JACOB I. KARRO,
Acting Assistant Solicitor,
ISABELLE R. CAPPELLO,
Attorney.
Department of Labor, Washington 25, D.C.

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